IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2939 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SUSHILABEN RAMJIBHAI PATEL - Petitioner(s)

Versus

CHIMANLAL CHUNILAL SONI & 1 - Respondent(s)

==========

Appearance :

MR VC DESAI for Petitioner No(s).: 1.

MR AM PAREKH for Respondent No(s).: 1.
RULE SERVED for Respondent No(s).: 2.

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 18/08/2005

ORAL JUDGMENT

1. By filing instant petition under Articles 226/227 of the Constitution, the petitioner seeks

to challenge the order dated 20.12.2001 recorded below application Ex.5 in Civil Misc. Appeal No. 85 of 2001 by the learned Extra Assistant Judge, Ahmedabad Rural at Ahmedabad by which the order dated 9.11.2001 recorded below application Ex.5 in RCS No.61 of 2000 by the learned Civil Judge (JD), Viramgam rejecting the application filed by respondent No.1 against the petitioner seeking ad-interim injunction has been modified in the following terms:

> “(i) The landlord is entitled to carry out repairs of the latrine as such he is the landlord of the property and he has got the right to carry out repairs of the property;
>
> (ii)The landlord is directed to carry out the repairs in such a way that it may not cause any inconvenience and or curtail any facility to the tenant;
>
> (iii)If the landlord is desirous to carry out the repairs he is at liberty to carry out the

repairs in the terms as aforesaid.

(iv)Whatever the doors and or any repairs is being carried out will be subject to hearing of the present appeal.”

Therefore, it is prayed to quash and set aside the said order as well as the order dated 19.1.2002 rendered in Civil Misc. Appeal No.85 of 2001 permitting the respondent No.1 to withdraw the appeal.

2. Respondent No.1 filed RCS No. 61 of 2000 against the petitioner and respondent No.2 in the Court of learned Civil Judge (JD), Viramgam, for declaration and permanent injunction. In the said suit, it is averred by respondent No.1 that he is the owner of one immovable property bearing Survey No.644 and Municipal Census No.3/9/40 and 3/9/41 situated on Golvali Road at Viramgam ('the suit premises' for short). Out of the said property, the petitioner is tenant of first floor and second floor. On the ground floor there is a

latrine. It is the case of respondent No.1 that since latrine was old one and repairing was necessary, he started work of repairing the same but the petitioner prevented him from doing the same. Respondent No.1 further averred that the petitioner has no independent right in respect of the said latrine and, therefore, the petitioner has no right to prevent him from doing repairing work of latrine. Respondent No.1 further averred that the petitioner herself has tried or repair the latrine and in pursuance thereof the petitioner asked for permission from respondent No.2 for constructing and repairing latrine and the same has been granted. Respondent No.1 contended that the petitioner has no right to make construction or to repair the latrine. Respondent No.1 further contended that since the petitioner is trying to make construction and repairing work of latrine on the basis of said permission, the petitioner is required to be prevented from doing so. On these and other

contentions as stated in the plaint, respondent No.1 prayed for the relief of declaration that permission granted by respondent No.2 to the petitioner be declared as illegal, arbitrary and self-willed and also claimed permanent injunction restraining the petitioner from carrying out construction work of the latrine in the suit premises.

2.1. Along with the suit, by Ex.5, respondent No.1 prayed for ad-interim relief that on the strength of permission which has been granted by respondent No.2 to the petitioner, she or her agents be restrained from making construction of latrine in the suit premises. Initially the learned trial Judge has been pleased to grant an order to maintain status quo.

2.2. The petitioner resisted said Ex.5 by filing her written statement at Ex.13. The petitioner contended that she is the tenant of first and

second floors of the suit premises and is enjoying the amenities and facility of latrine as a tenant since last 70 years. The petitioner contended that said latrine was on the otla of the ground floor and door of said latrine was abutting on northern side of otla. The petitioner contended that formerly there was a tenant on ground floor also but respondent No.1 has taken possession from him. The petitioner contended that she has obtained permission from respondent No.2 for repairing latrine which is legal one. The petitioner contended that essential service of latrine which is being enjoyed by her since the time of the predecessor in title of respondent No.1 has been illegally and unauthorizedly demolished by respondent No.1. The petitioner further contended that thus the petitioner is deprived of the essential service of latrine by respondent No.1. The petitioner contended that such action of respondent No.1 is illegal and by doing so, it is the intention of

respondent No.1 to harass and pressurize the petitioner so that the petitioner may handover possession of suit premises. The petitioner further contended that as per Section 23 of the Bombay Rent Act she has right to make tenantable repairs. The petitioner further contended that before respondent No.2 also respondent No.1 submitted objections but the same have been overruled and the petitioner has been granted permission. On these and other contentions as stated in said reply, the petitioner prayed for dismissal of the suit and Ex.5. The petitioner also produced documentary evidence vide list Ex.58 (1 to 24) and by list Ex.61 (1 and 2).

2.4. The learned trial Judge on appreciation, evaluation and critical analysis of the pleadings of the parties and evidence on record, vide order dated 9.11.2001, dismissed the application Ex.5 and thereby the order of status quo granted vide order dated 9.6.2000 has been quashed and set

aside.

2.5. Aggrieved thereby respondent No.1 filed Civil Misc. Appeal No.85 of 2001 in the District Court, Ahmedabad Rural. Along with the appeal, respondent No.1 also moved application Ex.5 and prayed that till final disposal of the said appeal, the order of the trial court passed below application Ex.5 be stayed.

2.6. The learned Extra Assistant Judge who heard the appeal, at the time of admission hearing, has passed interim order permitting respondent No.1 to carry out repairs of the latrine on certain terms and by virtue of the said order, the order of the trial court is modified to which reference is made earlier.

2.7. The petitioner thereafter filed application Ex.16 seeking modification of the order dated 20.12.2001, inter alia, praying to issue

direction to respondent No.1 that he should place door in such a way which may not open towards northern side of otla. The learned lower appellate Judge passed order to issue notice. Thereafter the petitioner submitted application Ex.27 stating that respondent No.1 has constructed the latrine in such a way that (i) its width is narrowed down to 3/4″ to 1 ft. and (2) since about 70 years door of said latrine which was originally on northern side of Otla but in new construction it has been changed from northern side (which was abutting on otla) to western side which is abutting on road.

2.8. The petitioner therefore contended that by such construction made by respondent No.1 it would cause inconvenience and would curtail the facility of latrine to the petitioner. In the said application the petitioner also prayed that respondent No.1 be directed to place door of the latrine in such a manner so that it can be opened

on the northern side of otla.

2.9.Thereafter respondent No.1 filed application Ex.26 seeking permission to withdraw the appeal by making statement that he has made repairing work as per the order of the court and in view of the said application, the learned lower appellate judge passed an order on 19.1.2002 granting permission to respondent No.1 to withdraw the appeal and accordingly the appeal stood withdrawn, which has given rise to the present petition.

3. The petitioner has filed this petition inter alia challenging the order dated 20.12.2001 passed below application Ex.5 in Civil Misc. Appeal No.85 of 2001 as well as the order dated 19.1.2002 recorded below Civil Misc. Appeal No.85 of 2001 permitting respondent No.1 to withdraw the appeal, by invoking the aids of Articles 226 and 227 of the Constitution.

4. Mr. V.C. Desai, learned advocate of the petitioner, has contended that the lower appellate court has granted permission to construct the latrine on certain terms and conditions. Respondent No.1 has violated the said terms and conditions and erected the latrine in such a way which would cause inconvenience to the petitioner. According to him, the order under challenge if allowed to stand it would occasion failure of justice and would cause irreparable injury to the petitioner. It is also asserted by him that the lower appellate court has failed to consider the conduct of respondent No.1 that since last 70 years from the time of predecessor in title of respondent No.1 the petitioner enjoyed the facility and amenities of latrine which was on the otla of ground floor, door of which was opening on northern side of the otla. Notwithstanding this fact, respondent No.1 has constructed the latrine in such a way that it

would cause inconvenience to the petitioner and with a view to harass and pressurize the petitioner to vacate the suit premises. After demolishing the latrine, it is constructed in such a way that it is impossible for the petitioner to enjoy the facility of latrine. It is also asserted by him that respondent No.1 under the guise of interlocutory interim order dated 20.12.2001 recorded below application Ex.5 in Civil Misc. Appeal No.85 of 2001 has carried out the construction of latrine in such a way and in clear disregard to the direction given by the learned Extra Assistant Judge which causes inconvenience to the petitioner and thereafter withdrew the appeal unconditionally. Therefore, according to him, the learned lower appellate Judge ought not have allowed respondent No.1 to withdraw the appeal without adjudicating the issues raised in the said appeal.

5. The sum and substance of the submission made

by Mr. Desai centers around that respondent No.1 has taken undue advantage of the interim order passed by the lower appellate Judge and thereafter withdrew the appeal. Therefore, according to him, both the orders are erroneous and illegal and in passing the same the learned lower appellate Judge has committed jurisdictional error also and, therefore, according to him, both the orders are required to be quashed and set aside. Therefore, he urged that the petition may be allowed.

6. Per contra, Mr. Parekh, learned advocate of respondent No.1, has supported the order passed by the learned lower appellate Judge as according to him no illegality or infirmity much less jurisdictional error has been committed by the learned lower appellate Judge in passing the impugned order which does not call for interference in this petition filed under Articles 226/227 of the Constitution of India.

According to him, it is inherent right of the appellant to withdraw the appeal and therefore the learned lower appellate Judge has rightly allowed respondent No.1 to withdraw the appeal. According to him, respondent No.1 has not taken any undue advantage of the interim order passed by the learned lower appellate Judge. According to him, respondent No.1 has constructed the latrine in terms of the modified order passed by the lower appellate court. He therefore contended that the petition lacks merit and deserves to be rejected and prayed that it may be rejected.

7. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned orders as well as various averments made in the petition as well as in the reply affidavit.

8. There is no dispute to the fact that the

petitioner is the tenant of the first and second floors of the suit premises for the last 70 years, having facilities and amenities of the latrine situated in otla that opens on the northern side of the otla. In the year 1999 respondent No.1 demolished the latrine and thereby respondent No.1 has deprived the petitioner from enjoying the said facility of latrine as tenant since October 1999. Thereafter on 16.10.1999 respondent No.1 field RCS No.178 of 1999 against the petitioner in the court of learned Civil Judge (JD), Viramgam and prayed for the relief of permanent injunction not to obstruct him from repairing latrine and from placing the door of latrine that opens towards the western side. In para 3 of the said suit, respondent No.1 has stated that the condition of the latrine and wall was such that at any time it may fall down and therefore he may be permitted to repair it by placing the door of the latrine on the western side instead of northern side

which was its original position. In the said suit respondent No.1 also moved application Ex.5 and prayed for ad interim injunction restraining the petitioner from obstructing the repairing of the latrine and from putting the door on western side. Therefore, there is no manner of doubt that prior to demolishing the latrine, the door of the latrine was on the northern side and therefore the respondent No.1 had claimed the relief for restraining the petitioner from obstructing him from placing the door of the latrine on the western side instead of northern side. The learned trial Judge has not granted interim relief as prayed for by the respondent No.1 in Ex.5.

9. Thereafter petitioner applied to Viramgam Nagarpalika to accord her permission to construct the latrine and by resolution dated 8.6.2000, respondent No.2 Nagarpalika granted permission to the petitioner to construct the

latrine. Immediately thereafter on 9.6.2000 respondent No.1 filed present RCS No.61 of 2000 and prayed for declaration that the permission granted by respondent No.2 to the petitioner be declared as illegal, arbitrary and self-willed. By filing Ex.5, respondent No.1 also prayed for ad interim injunction restraining the petitioner from making construction of latrine. Initially the learned trial Judge passed an order to maintain status quo. But after bipartite hearing, the learned trial Judge rejected the application Ex.5 moved by respondent No.1 vide order dated 9.11.2001 and vacated the order of status quo granted earlier.

10. Aggrieved thereby respondent No.1 has field CMA No.85 of 2001 before the District Court, Ahmedabad Rural which was placed for admission hearing before the learned Extra Assistant Judge, Ahmedabad Rural. In the said appeal, respondent No.1 moved application Ex.5 and prayed that the

order of the learned trial Judge may be stayed. However, the learned Extra Assistant Judge has been pleased to pass interim order permitting respondent No.1 to carry out repairs of latrine on certain terms and thereby modified the order dehors the prayers made in application Ex.5 as there was no prayer for modification of the order. As per condition No.4 of the modified order, it was stipulated that whatever the doors and or any repairs is being carried out will be subject to hearing of the present appeal. Inspite of this specific order, respondent No.1 has taken undue advantage of the said order by (i) putting the door of the latrine on the western side instead of northern side and (ii) width of the latrine has been narrowed down to about ¾ to 1 ft. Thus such construction causes great inconvenience and also curtailed the facility of the petitioner. After taking undue advantage of the modified order, respondent No.1 filed application Ex.26 for permitting him to withdraw

Civil Misc. Appeal No.85 of 2001. The petitioner raised objections that under the guise of interim order, respondent No.1 has constructed the latrine in violation and in clear disregard of the modified order and therefore permission to withdraw the appeal may not be granted. It was also contended before the learned Extra Assistant Judge that order recorded below application No.5 was subject to hearing of the main appeal and if the main appeal is not heard and the order passed below application Ex.5 is carried out in clear disregard of the order, it would virtually amount to allowing the appeal even after withdrawal of the appeal. Notwithstanding the aforesaid objections and contentions raised by the petitioner, the learned lower appellate Judge has allowed respondent No.1 to withdraw the appeal which, according to this court, ought not to have been allowed and he should have adjudicated the issues raised in the appeal as the order passed below application

Ex.5 was subject to hearing of the main appeal.

(Emphasis added).

11. It may be noted that by submitting application Ex.5 in CMA No.85 of 2001 respondent No.1 has prayed for stay of the operation of the trial court's order, that is, rejecting the application Ex.5. The lower appellate court has not only exceeded its jurisdiction by modifying the order in such a way that it would cause inconvenience to the petitioner and granted permission to respondent No.1 to repair the latrine and thereby has acted dehors the provisions of the Gujarat Municipalities Act. According to this Court, the lower appellate court had no jurisdiction to grant such permission and therefore the order dated 20.12.2001 passed below application Ex.5 in CMA No.85 of 2001 deserves to be quashed and set aside as it is passed without jurisdiction and respondent No.1 cannot be allowed to take undue

advantage by withdrawing the appeal.

12. It is also required to be noted that in previous Civil Suit No.178 of 1999 field by respondent No.1, the trial court did not grant injunction. Thereafter respondent No.1 filed another suit being RCS No.61 of 2001 in which also interim relief was prayed for which was also rejected. Thereafter respondent No.1 filed appeal being Civil Misc. Appeal No.85 of 2001 before the District Court, Ahmedabad Rural and along with the said appeal, application Ex.5 was moved upon which the learned Extra Assistant Judge passed the order modifying the order recorded below application Ex.5 and after obtaining the interim order in application Ex.5 moved in Civil Misc. Appeal No.85 of 2001, respondent No.1 withdrew the appeal and, therefore, respondent No.1 cannot be permitted to take undue advantage of the said interim order which was absolutely without jurisdiction and illegal.

13. In view of the fact that conditions incorporated in interim order dated 20.12.2001 have not been complied with by respondent No.1, if the order dated 19.1.2002 of disposing of the appeal on the basis of Ex.26 is allowed to remain operative, it would amount to abuse of process of court. Respondent No.1 cannot be permitted to withdraw the appeal as it would tantamount to reaping the benefit by abusing the process of Court. The intention of respondent No.1 was to harass and oppress the petitioner by abusing the process of law who is a retired teacher aged about 79 years at present, by abusing the process of law.

14. It may be noted that after getting the modified order dated 20.12.2001 recorded below application Ex.5 in CMA No.85 of 201 respondent No.1 has constructed the latrine in clear disregard to the order by putting the door of

the latrine on western side of the otla instead of northern side of the otla and thereafter he has withdrawn the appeal. Therefore, according to this court, the order dated 20.12.2001 recorded below application Ex.5 in CMA No.85 of 2001 must be quashed and set aside by directing respondent No. 1 to comply with the modified order in its true sense and spirit by putting the door of the latrine on the northern side of the otla by demolishing the door on the western side of the latrine and the western side wall would be made blind. Since respondent No.1 has withdrawn the appeal, this court does not deem it expedient to quash and set aside the order of withdrawal of the appeal.

15. Seen in the above context, the order dated 20.12.2001 passed by the learned Extra Assistant Judge, Ahmedabad Rural at Ahmedabad in Civil Misc. Appeal No.85 of 2001 deserves to be quashed and set aside and thereby respondent No.1

should be ordered to comply with the modified order in its true sense and spirit by putting the door of the latrine on the northern side of the otla by demolishing the door on the western side of the latrine and make the western side wall blind. Since the appeal is permitted to be withdrawn by the learned lower appellate Judge, this court does not deem it expedient to quash and set aside the order of withdrawal of the appeal.

16. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs. The order dated 20.12.2001 recorded by the learned Extra Assistant Judge, Ahmedabad Rural, Ahmedabad in Civil Misc. Appeal No.85 of 20001 is hereby quashed and set aside. Respondent No.1 is directed to put the door of the latrine situated in the suit premises on the northern side of the otla by demolishing the door on the western side of the latrine which has been

erected in clear violation of the modified order passed by the learned lower appellate judge and the western side wall of the latrine shall be kept blind. Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

...

(karan)